STATE OF MICHIGAN

COURT OF APPEALS

LYNAE J. KUPER, Personal Representative of the Estate of MARK KUPER, Deceased, Plaintiff-Appellant, v METROPOLITAN HOSPITAL, PAUL R. DWYER, M.D., and LEONARD A. LEWIS, JR., D.O., Defendants-Appellees.	UNPUBLISHED January 27, 2005 No. 250952 Kent Circuit Court LC No. 01-006518-NH

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals from the trial court's order that granted defendants summary disposition in this medical malpractice action, and we affirm.

I

Decedent died on January 16, 1999, of bacterial endocarditis, which results from bacterial growth on the heart and its valves. Decedent became ill in late December 1998, and visited defendant Dr. Lewis, his family physician, on December 28, 1998, January 11, 1999, and January 13, 1999. Decedent also sought medical care at defendant Metropolitan Hospital's (Metropolitan) emergency room, where defendant Dr. Dwyer treated him. None of these visits resulted in a diagnosis of decedent's ultimately fatal bacterial infection. Decedent again visited Dr. Lewis on January 15, 1999. Dr. Lewis then sent decedent to Metropolitan, and soon thereafter his bacterial infection was diagnosed. Decedent was then transferred to Spectrum Hospital for surgery. Physicians at Spectrum gave decedent antibiotics with the goal of stabilizing decedent's condition before performing surgery. Decedent died the next evening on January 16, 1999.

II

We review a trial court's decision with respect to a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

III

Plaintiff argues that the trial court erroneously granted summary disposition in favor of defendants on the basis that plaintiff failed to establish causation under MCL 600.2912a. In relevant part, MCL 600.2912a provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%. [MCL 600.2912a(2).]

The second sentence has been interpreted to mean that a plaintiff must show that a defendant's negligence caused the probability of survival to decrease by fifty or more percentage points. *Fulton v William Beaumont Hosp*, 253 Mich App 70, 82-83; 655 NW2d 569 (2000).

Plaintiff's expert witness Dr. Neil A. Crane testified that decedent's opportunity to survive was eighty to ninety percent assuming that decedent had been correctly diagnosed and treated no later than January 14, 1999.

Plaintiff's expert Dr. Michael D. Crittenden testified that decedent's opportunity for survival through January 10, 1999, was "as much as" eighty-five percent. His chance of survival between January 13 through 16, 1999, was between seventy and eighty percent.

Plaintiff's expert Marc L. Schwartz opined that plaintiff's probability of survival was eighty-seven percent on December 28, 1998, and dropped to "a worst case scenario" of fifty-eight percent on January 15, 1999.

Defendants moved for summary disposition, and argued that by the testimony of plaintiff's own experts, plaintiff could not meet the causation test established by *Fulton*. Plaintiff countered that the *Fulton* test was satisfied because the survival probabilities given by plaintiff's experts presumed that decedent would receive surgical care, and because he did not, his actual probability of survival was zero percent. The trial court rejected this argument, reasoning that "[i]f we say that [the] opportunity to survive was seventy percent when the diagnosis was made but that's only if he lives long enough, it becomes meaningless. Presumably, any of these numbers factor in a number of different . . . scenarios."

We agree with the trial court's reasoning. Plaintiff, in essence, relies on the benefit of hindsight, and attempts to argue that the *Fulton* rule is satisfied because the fact that decedent died means that his survival probability necessarily was zero. This clearly contradicts the testimony of plaintiff's own experts, who established that, at worst, decedent's probability of survival dropped from ninety percent to fifty-eight percent. This lowered survival rate apparently reflected the risks attendant to all kinds of treatment given the delay, including surgery and necessary presurgical stabilization efforts. Contrary to plaintiff's arguments, no one testified that the delay meant that surgery was no longer an option, and, in fact, decedent was undergoing a presurgical regimen when he died. Thus, the record established only a differential of thirty-two percentage points. Because this falls below the fifty-percentage-point threshold established by *Fulton*, we hold that the trial court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra

I concur in result only.

/s/ Michael R. Smolenski